No. 71

In the Supreme Court of the United States

OCTOBER TERM, 1945

MINE SAFETY APPLIANCES COMPANY, APPELLANT

v.

JAMES V. FORRESTAL

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

INDEX

CITATIONS

Cases cited:

Cases cited—Continued.

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OPINIONS BELOW

The opinions of the District Court of the United States for the District of Columbia (R. 54–62) are reported in 59 F. Supp. 733, 737.

JURISDICTION

The judgment of the District Court was entered on April 9, 1945 (R. 63). The petition for appeal was presented on May 1, 1945 (R. 64), and allowed on the same day (R. 67). The case was docketed in this Court on May 12, 1945. On June 11, 1945, this Court entered an order noting probable jurisdiction (R. 71–72).

Jurisdiction of this Court is asserted to be based on Section 3 of the Act of August 24, 1937 (c. 754, § 3, 50 Stat. 752; 28 U. S. C. 380a).

QUESTION PRESENTED

Whether the court below erred in dismissing for want of jurisdiction this suit by a Government contractor seeking (1) to enjoin the Secretary of the Navy from withholding monies in the Treasury of the United States otherwise due to the contractor but determined by the Secretary to be the amount of excessive profits returnable to the United States by the contractor under the Renegotiation Act, and (2) to have that Act declared invalid.[1]

STATUTE INVOLVED

The Renegotiation Act is set forth in a separate pamphlet (Appendix A) filed with this brief, and entitled "The Renegotiation Act."

STATEMENT

This is an appeal from a judgment of a specially constituted three-judge court, convened pursuant to Section 3 of the Act of August 24, 1937 (28 U. S. C. 380a), dismissing a suit by appellant, Mine Safety Appliances Company, to re-

[1] The order of this Court dated June 11, 1945, noting probable jurisdiction, stated: "Counsel are requested to discuss in their briefs and on oral argument the questions whether this is a suit against the United States and whether the complaint states a cause of action in equity. The Court does not desire to hear argument upon any other question not passed upon by the District Court. Counsel will be free to discuss in their briefs and upon oral argument the failure of appellant to proceed before the Tax Court as provided in Section 403 (c) of the Renegotiation Act of 1942 as amended, 50 U. S. C. app., Supp. IV, sec. 1191 (c)." (R. 71–72.)

strain appellee, James V. Forrestal, from withholding monies otherwise due appellant, but determined by the appellee, as Under Secretary of the Navy, to be excessive profits returnable by appellant to the United States pursuant to an order issued under the Renegotiation Act.[2]

The following facts are either alleged in the complaint or undisputed in the record:

Appellant Mine Safety Appliances Company, a Pennsylvania corporation, entered into a number of contracts with the Navy Department and with its contractors for the manufacture of supplies or materials needed for the prosecution of the war (R. 1, 13). By order dated March 4, 1944, appellee James V. Forrestal as Under Secretary of the Navy, acting under a delegation of authority from the Secretary of the Navy, found and determined (R. 3, 5–6, 26) that excessive profits of $4,950,000

[2] The original Renegotiation Act was contained in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942 (56 Stat. 226), and was amended by the Revenue Act of 1942, approved October 21, 1942 (56 Stat. 798), the Military Appropriations Act, 1944, approved July 1, 1943 (57 Stat. 347), the Act of July 14, 1943 (57 Stat. 564), and the Revenue Act of 1943, approved February 25, 1944. The amendments in the Revenue Act of 1943 were in general made effective only with respect to fiscal years ending after June 30, 1943, and these are not here relevant. However, the *de novo* review of renegotiation orders by the Tax Court, added by the Revenue Act of 1943, was made applicable to prior fiscal years, including those covered by the order here involved (see Sec. 403 (e)). The pertinent provisions of these statutes are collected in Appendix A, separately printed and filed with this brief.

had been realized by appellant during 1941 and 1942 under contracts and subcontracts subject to the Renegotiation Act, which directs the Secretary of the Navy, *inter alia*, to determine whether excessive profits have been realized under war contracts and subcontracts and to take steps to eliminate such profits. (Secs. 403 (a) and (c); see Appendix A, pp. 6, 8–9.)[3] That order notified apellant that if it did not voluntarily take action on or before March 8, 1944, "to eliminate said excessive profits" less certain tax credits, appellee Forrestal would take "appropriate action" to do so by "directing the withholding of amounts otherwise due to you as a contractor or subcontractor by the Government and by contractors" (R. 6).[4]

On March 8, 1944, appellant instituted this suit

[3] Prior to the order, meetings and hearings were held between appellant's representatives and the Navy Price Adjustment Board for the purpose of determining the amount of excessive profits, if any, realized by appellant on war business during 1941 and 1942 and looking towards a voluntary agreement for the elimination of any such profits, but no agreement was reached (R. 20–26). The sum of $4,950,000, determined by the Secretary to be excessive profits, consisted of $550,000 for 1941 and $4,400,000 for 1942, without taking into account the applicable tax credits permitted by Sec. 403 (c) (3) of the Act (see Appendix A, p. 10). These credits were subsequently computed to total $3,935,126.22, thus leaving a net refund of $1,014,673.78 due to the United States under the Renegotiation Order of March 4, 1944 (R. 48–49).

[4] Section 403 (c) (2) of the Renegotiation Act authorizes and directs the Secretary to eliminate excessive profits "(i) by reductions in the contract price of the contract or subcontract * * *; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount

(R. 1–17) in the District Court of the United States for the District of Columbia, to enjoin Frank Knox, then Secretary of the Navy, and appellee Forrestal, then Under Secretary of the Navy, from (1) "Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent [thereof] to withhold any monies due, or to become due to [appellant] from the United States or any agency or instrumentality thereof;" (2) "Instructing or requesting any prime contractor or subcontractor * * * to withhold any monies due or to become due to" appellant; (3) "further proceeding * * * to renegotiate * * * contract prices" for appellant; and (4) "proceeding in any manner * * * to enforce the determination and order of March 4, 1944" (R. 16).[5] The complaint alleged that the injunctive relief was sought "primarily" on the ground that the Renegotiation Act and the Secretary's order thereunder

of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable." (Appendix A, p. 9.)

[5] After this action was commenced, Knox died and Forrestal was appointed Secretary of the Navy (R. 36–37). The court below thereafter entered an order substituting Forrestal as the sole defendant (R. 37–38). He will herein be sometimes referred to as the "Secretary."

were invalid (R. 3), but it averred, as additional grounds for relief, that appellant realized no excessive profits in 1941 and 1942 (R. 11), and that the Secretary's order included contracts not subject to renegotiation (R. 9–10). The complaint also sought a declaratory judgment that the Renegotiation Act is unconstitutional and unenforceable against appellant (R. 16–17).

On March 9, 1944, the parties stipulated that the Secretary "will cause the Navy Department to suspend payments, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department" to appellant "up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944;" that the Secretary will take no other action to enforce the order of March 4, 1944, or to eliminate the excessive profits pending final determination; and that appellant will not apply for any injunctive relief pending final determination (R. 17–18).

After the Secretary filed an answer to the complaint (R. 18–34), a special three-judge court[6] was designated at appellant's request, by the Chief Justice of the United States Court of Appeals for

[6] Consisting of Circuit Justice Miller and District Justices Bailey and McGuire, all of the District of Columbia.

the District of Columbia pursuant to Section 3 of the Act of August 24, 1937 (R. 35–36).

On December 9, 1944, the Secretary moved to dismiss the complaint on the grounds that the court lacked jurisdiction over the subject matter of the action and that the complaint failed to state a claim against him upon which relief could be granted (R. 41).[1] In support of the motion, the Secretary filed an affidavit (R. 41–46) in which he stated, inter alia, that he had theretofore determined that $1,014,873.78 was the final net amount of refund due the United States under his excess profits determination of March 4, 1944, after allowance of tax credits (R. 45); and that such sum, as to which payment was suspended pursuant to the aforesaid stipulation—

> is being held as an obligated but unexpended balance in the particular appropriation accounts of the Navy Department applicable to the various contracts with [appellant]. The result is that such total of suspended payments is being held by the Treasury of the United States as an unexpended portion of money appropriated by the Congress to the Navy Department or allocated to it by another Department or agency * * *.
>
> * * * such money is being so held, pending the outcome of the suit, and will

[1] In the alternative, the Secretary moved for summary judgment on the grounds that there was no genuine issue as to any material fact and that he was entitled to a judgment as a matter of law (R. 41).

> continue to be carried in the proper appropriation accounts on the books of the Treasury subject to applicable statutory limitations. If [appellant] is unsuccessful in this suit, such money will immediately be transferred, on the books of the Treasury, from the appropriations available to the Navy Department to miscellaneous receipts of the Treasury. The amount of payments suspended will satisfy [appellant's] liability for excessive profits under the Renegotiation Act for its fiscal year 1941 and 1942. (R. 46).

On April 9, 1945, the court below entered a judgment dismissing the complaint for want of jurisdiction (R. 63) on the ground that the suit was one against the United States (R. 54–62).[3] Appellant has brought that judgment here by an appeal (R. 64–72).

SUMMARY OF ARGUMENT

1. Appellant, considering itself aggrieved by the determination of the Secretary that it had realized excessive profits under the Renegotiation Act, at once applied to the court below for injunctive and declaratory relief, disregarding the statutory remedy—the Tax Court—provided by the Congress for the redetermination of excessive profits. Whatever the finality of a Tax Court determina-

[3] The opinion of the court was written by Justice McGuire and concurred in by Justice Miller (R. 54, 62). Justice Bailey wrote a separate "concurring opinion" in which the other two Justices joined (R. 62).

tion, it is plain that Congress intended that persons aggrieved by renegotiation orders should seek initial, if not final, relief in the Tax Court and not in the equity courts. The legislative materials underlying the Tax Court remedy plainly show that Congress considered and rejected District Court review of renegotiation determinations, and instead selected a single "exclusive" forum for the *de novo* determination of all questions relating to amount. The Tax Court's jurisdiction, which would cover all questions raised by appellant in its complaint below other than the validity of the Act itself, precludes the granting of injunctive or declaratory relief by a federal court of equity.

The mere availability of the Tax Court remedy, wholly apart from the "exclusive" nature of its jurisdiction, requires that appellant exhaust it before seeking relief in a court of equity. If appellant had taken its complaint to the Tax Court instead of to an equity court, as Congress intended, its controversy with the Government might have ended in appellant's favor, rendering moot the issue as to the validity of the Renegotiation Act. Appellant may not evade the obligation to exhaust the administrative remedy by charges that the underlying statute is unconstitutional; and the federal courts will not decide constitutional questions if full relief could be had on less critical issues. For like reasons, declaratory relief is not available to appellant. See *Alabama*

State Federation of Labor, Local Union No. 103 v. *McAdory*, No. 588, October Term, 1944, decided June 11, 1945.

The finality of Tax Court determinations is likewise no excuse for appellant's disregard of that remedy. Similar provisions have been sustained by this Court in comparable legislation dealing with excessive profits (*Williamsport Co.* v. *United States*, 277 U. S. 551), but it is in fact immaterial whether and to what extent Tax Court determinations are not judicially reviewable, since the invocation of its jurisdiction might give appellant all the relief it claims. *First National Bank* v. *Weld County*, 264 U. S. 450. In any event appellant is entitled in a subsequent available remedy at law to judicial review of the constitutionality of the Renegotiation Act, and may also obtain judicial review of any other issues which he is constitutionally entitled to have so decided (*Crowell* v. *Benson*, 285 U. S. 22; see Sec. 403 (g) of Renegotiation Act (separability clause)).

2. By stipulation between the parties the elimination of appellant's excessive profits under the Secretary's order is being effectuated solely by withholding from appellant an equivalent amount of monies otherwise due it from the United States under Government contracts. Appellant's prayer for an injunction against such withholding is thus in effect an attempt to obtain money from the United States Treasury as a general creditor

against whose claim the United States has set-off an equivalent amount alleged to be due to the United States under the Renegotiation Act. If the Act is invalid, the set-off is improper, and appellant has an adequate remedy at law in the Court of Claims to recover the amount due it under its contracts. In such a suit, the Government's defense that the set-off is justified under the Renegotiation Act will enable appellant to obtain a decision as to the validity of the Act and of any other questions not precluded by his failure to apply to the Tax Court. The availability of the adequate remedy at law prevents the exercise of equitable jurisdiction, particularly where the validity of an Act of Congress is sought to be made the turning point of the case. See *Goffman v. Breeze Corporations, Inc.*, 323 U. S. 316.

3. The suit seeks, in effect, to compel the payment of monies to appellant out of the United States Treasury by eliminating the only bar to such payment, thus specifically enforcing the contract between appellant and the United States. It is therefore a suit against the United States, to the maintenance of which in the present forum Congress has not consented.

ARGUMENT

Under the Renegotiation Act the Secretary of the Navy is "authorized and directed" to "renegotiate" and to "eliminate any excessive

profits" realized on contracts and subcontracts subject to the Act (Sec. 403 (c) (1) and (2); Appendix A, pp. 8–9). Proceeding under that statute, the Secretary determined that appellant had realized "excessive profits" of about $1,000,000 on renegotiable business and required that these be refunded or otherwise eliminated. Appellant refused to comply.

The Act authorizes and directs the Secretary "to eliminate any excessive profits" by several methods (Sec. 403 (c) (2); see n. 4, *supra*), but by stipulation with appellant (R. 17–18), the Secretary has agreed to eliminate the excessive profits solely by directing the withholding of an equivalent amount from amounts otherwise due to appellant on certain contracts with the United States. The sum thus withheld is being retained in the Treasury of the United States, credited upon its books to the Navy Department's account; the final elimination of the excessive profits will merely require the transfer of this amount upon the Treasury's books from the Navy account to miscellaneous receipts.

The Act, as amended prior to this suit, provides that any "contractor or subcontractor * * * aggrieved by a determination of the Secretary * * * as to the existence of excessive profits, * * * may, within ninety days * * * after the date of such determination, file a petition with the Tax Court of the United States for a redetermination thereof," and further that

> Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * * and such determination shall not be reviewed or redetermined by any court or agency. (Sec. 403 (e); Appendix A, pp. 37-39.)

Ignoring the Tax Court, appellant has brought this suit to enjoin the Secretary from withholding any money due to appellant "from the United States", and to declare the Act invalid and unenforceable against appellant (R. 16–17). As grounds for injunctive relief appellant urges "primarily" (1) that the Act is unconstitutional (R. 3, 11–13), but also that the Secretary's renegotiation order is in error (2) in finding that appellant had realized any excessive profits (R. 11) and (3) in including within its computation contracts not properly subject to the Act (R. 6, 9–11). We submit that the dismissal of the suit by the court below is proper for at least three reasons:

1. Appellant failed to apply for relief to the "exclusive jurisdiction" of The Tax Court, which might have decided that there were no excessive profits and thus ended appellant's controversy with the Government. Its failure to exhaust the administrative remedy is fatal to the grant of any relief by an equity court.

2. If appellant, despite its disregard of the Tax Court remedy, is entitled, as a matter of statu-

tory interpretation or constitutional right, to a judicial decision as to the validity of the Act or the renegotiation order, or as to any other issue raised thereby, such a decision can be had and full relief granted in the Court of Claims *via* a suit for the money withheld from appellant under contracts with the United States. The adequacy of the remedy at law precludes equitable relief here.

3. While this is nominally a suit against Forrestal, the relief sought—an injunction against the "withholding" of monies due to appellant from the United States under Government contracts and a declaration that the Act underlying the withholding is unconstitutional—makes the action one against the United States. Congress has not consented to such a suit.

I

Appellant Failed to Exhaust the Statutory Remedy for the Redetermination of Excessive Profits

Appellant, considering itself aggrieved by the determination of the Secretary that it had realized excessive profits of some $1,000,000, at once applied to the court below for injunctive and declaratory relief, spurning the procedure provided by Congress for the redetermination of renegotiation orders in the Tax Court. Such premature resort to judicial process is not only directly contrary to the Congressional intendment, but is "at

war with the long settled rule of judicial administration" requiring exhaustion of the statutory remedy before applying to the courts for equitable relief. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51.

A. THE "EXCLUSIVE JURISDICTION" OF THE TAX COURT

Section 403 (c) of the Renegotiation Act (Appendix A, pp. 37–39) gives the Tax Court "*exclusive jurisdiction* * * * to finally determine the amount, if any, of such excessive profits," and provides that its "determination shall not be reviewed or redetermined by any court or agency." (Emphasis added.)

Whether a decision by the Tax Court is judicially reviewable, and what issue, if any, would be foreclosed by its judgment, is not before this court or pertinent to a consideration of the instant case. The Tax Court has not been asked by appellant to decide and has not decided any aspect of the controversy at hand. The extent to which a judgment of that court can or should be judicially reexamined in view of the directions in the statute that its "determination shall not be reviewed * * * by any court", is not a matter to be decided in the abstract, before a record is made in the Tax Court, and before it is known what issues the Tax Court has been asked to decide, what issues it has decided, and what issues the contractor seeks to have redecided. But what-

ever the finality of a Tax Court decision, it is plain that Congress intended that persons aggrieved by renegotiation orders should seek initial, if not final relief, in the Tax Court, and not in the equity courts. The clear statutory language making the Tax Court's jurisdiction exclusive would without more preclude the exercise of jurisdiction by a district court on any question within the jurisdiction of the Tax Court, and the legislative history eliminates any vestige of doubt on this score.

The Tax Court remedy was not added to the Renegotiation Act until almost two years after its original enactment. The Ways and Means Committee of the House of Representatives, in reporting the bill which provided that remedy, repeatedly emphasized the "exclusive" jurisdiction which the Tax Court would have in redetermining the amount of excess profits. H. Rep. No. 871, 78th Cong., 1st Sess., pp. 76–77, 84–85. In the House, Congressman Disney, a member of the Committee and a sponsor of the provision, justified it as follows:

> The Tax Court was chosen to perform this function for four principal reasons. The first is, that the Tax Court deals with very similar problems under the excess profits tax. The second reason for choosing the Tax Court is the fact that in it judges hold court all over the United States and hence the contractors will not have to come to Washington to be heard by the court.

> The third is that the use of one forum will bring about uniformity in the development and application of principles of decision; and the fourth is that a forum had to be chosen upon which Congress could impose the duty of deciding the nonjudicial question as to the amount of excessive profits * * *. [89 Cong. Rec. 9929.]

The House passed this provision, but the Senate Finance Committee (S. Rep. No. 627, 78th Cong., 1st Sess., p. 34) and the Senate (90 Cong. Rec. 543), while agreeing that one forum should be given "exclusive" jurisdiction to make a *de novo* review of renegotiation determinations, substituted the Court of Claims for the Tax Court to perform this function (S. Rep. No. 627, 78th Cong., 1st Sess., p. 110). The conferees reinstated the Tax Court (H. Rep. No. 1079, 78th Cong., 2d Sess., p. 84), and the Senate accepted the Conference Report (90 Cong. Rec. 1301). In the House, Congressman Disney pointed out that under both the House and Senate versions, the review of renegotiation determinations—

> is required to be treated as a de novo proceeding in which all questions of fact and law may be decided. The conference report makes no change in this regard * * *. [90 Cong. Rec. 1355.]

Congressman Izac, a member of the conference committee from the House, also commented upon the provisions for "court review," saying:

> We of the Naval Affairs Committee sug-

> gested that they have recourse to the district courts of the land, but disregarding our recommendations it was decided to put it first in the Claims Court, and finally in the Tax Court. [90 Cong. Rec. 1357.]*

The Conference Bill was thereafter accepted by the House (90 Cong. Rec. 1359) and became law.

This background plainly shows that Congress considered and expressly rejected review by the district courts of renegotiation determinations, and instead provided for *de novo* hearing of the question of excessive profits by a single expert tribunal, the Tax Court, in order to "bring about uniformity in the development and application of principles of decision" (89 Cong. Rec. 9929), giving that tribunal "exclusive" jurisdiction extending to "all questions of fact and law" (90 Cong. Rec. 1355).

Whatever room is left for judicial action after the Tax Court makes its redetermination, the foregoing material makes it plain that Congress desired that contractors who complain of a renegotiation order should take their grievance to the

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* The House Committee on Naval Affairs, reporting on the "Renegotiation of War Contracts," had earlier recommended "that the Renegotiation Act be amended so as to provide that, whenever one of the Secretaries has made a unilateral determination, the contractor concerned may obtain judicial review of that determination in the United States District Court in the district in which the contractor maintains its principal place of business, within 60 days after the publication of the unilateral determination." H. Rep. No. 733, 78th Cong., 1st Sess., p. 34.

Tax Court, and not to a court of equity. Appellant seeks to avoid this obvious conclusion by contending that the Tax Court remedy is not mandatory but an "option" or "privilege" which the contractor is free to accept or reject, arguing that if "Congress had intended exclusive jurisdiction in a case of this nature" it would have used the term "shall" file instead of "may" file a petition in the Tax Court for a redetermination (Br., pp. 34–35). This confuses the alternatives which Congress gave to contractors. Obviously, Congress used the permissive "may" because it did not wish to *require* a contractor to seek review; "the alternative afforded by the use of the word 'may' is between seeking relief or submitting" to the Secretary's determination. *Lewis* v. *City of Lockport*, 276 N. Y. 336, 344, 12 N. E. 2d 431, 434.[10] To construe the statute as giving the contractor the alternative of applying to the Tax Court or to some other court, as he might see fit,

[10] Nor does the provision that the Tax Court shall have exclusive jurisdiction "Upon such filing" of the petition, affect the exclusiveness of the remedy. Such phrase is traditionally used in statutes whose effect is to create exclusive jurisdiction. See, e. g., Fair Labor Standards Act, 52 Stat. 1065, 29 U. S. C. 210; Securities and Exchange Act, 48 Stat. 901, 15 U. S. C. 78y (a); Holding Company Act, 49 Stat. 834, 15 U. S. C. 79x; Natural Gas Act, 52 Stat. 831, 15 U. S. C. 717r (b); Federal Power Act, 49 Stat. 860, 16 U. S. C. 825*l* (b); Food, Drug and Cosmetic Act, 52 Stat. 1052, 21 U. S. C. 355 (h); Civil Aeronautics Act, 52 Stat. 1024, 49 U. S. C. 646 (d); Federal Alcohol Administration Act, 49 Stat. 978, 27 U. S. C. 204 (h).

would not only empty the term "exclusive" of content, but would ignore the Congressional desire to achieve a uniformity in principles of decision by entrusting such matters to one Tax Court instead of to a number of district courts. Similar considerations have led this Court uniformly to hold that statutory remedies, no less permissive in form, must be exhausted before judicial review is sought. *Pittsburgh &c. Ry.* v. *Board of Public Works*, 172 U. S. 32, 44–45; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 229–230; *First National Bank* v. *Wild County*, 264 U. S. 450, 453–455; *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265, 269–270; *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468; *Petersen Baking Co.* v. *Bryan*, 290 U. S. 570, 575–576; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463."

" In urging that the jurisdiction of the Tax Court is non-exclusive, appellant cites the amendments made by the Revenue Act of 1943, which expressly provide that orders of the War Contracts Price Adjustment Board shall be final if no petition is filed in the Tax Court (Sec. 403 (c) (1); Appendix A, p. 28), but make no like provision for unilateral orders entered by a head of an agency, as here (App. Br. p. 35). This minor discrepancy is readily explained by the fact that these amendments were the fifth in a series of interlocking, piecemeal and urgent wartime measures designed to meet wartime exigencies and to incorporate the progressive lessons of actual experience into a Renegotiation program involving billions of dollars and many thousands of contracts. That a neatly fitting and symmetrical statutory structure was not evolved is occasion neither for surprise nor for reading into accidental differences of language a meaning at odds with the clear Congressional intent.

B. FAMILIAR PRINCIPLES REQUIRING EXHAUSTION OF THE ADMINISTRATIVE REMEDY ARE APPLICABLE HERE

Even if the Renegotiation Act did not in terms make the jurisdiction of the Tax Court "exclusive," appellant's failure to invoke the Tax Court remedy precludes judicial intervention by injunction or declaratory judgment. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *California* v. *Latimer*, 305 U. S. 255; *Federal Power Commission* v. *Edison*, 304 U. S. 375; *Petroleum Co.* v. *Commission*, 304 U. S. 209; *Newport News Company* v. *Schauffler*, 303 U. S. 54; *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300; *Miles Laboratories* v. *Federal Trade Commission*, 140 Fed. 2d 683 (App. D. C.), certiorari denied, 322 U. S. 752.

The practical considerations underlying the long-settled rule as to exhaustion of statutory remedies have forceful application to the instant case. Most of the questions raised by appellant in its complaint below can best be determined by the Tax Court, if respect is to be accorded to the congressional objectives of uniformity of decision and expert treatment of complex renegotiation issues. This is true of the allegations in the complaint that "neither factually nor legally is there a basis" for the Secretary's determination of excessive profits on appellant's business in 1941 or 1942 (R. 11); that appellant in its production of certain articles for military use has sacrificed

competitive advantages and made concessions to the Government of approximately $12,000,000, including voluntary price reductions of some $8,700,000 (R. 7–8); that appellant has made available to the United States valuable research data, and technical and manufacturing information (R. 7); that it reduced governmental procurement costs through its efficient operations (R. 8); that its costs and selling prices are the lowest in the industry as related to comparable products (R. 8); that it has risked large amounts of money in the war effort and through contract cancellations has suffered losses and incurred contingent liabilities (R. 11); and that the Secretary improperly included certain of appellant's contracts in the computation (R. 6, 8–10). Had these contentions been presented by appellant to the Tax Court, as Congress intended they should be, that forum could have fully disposed of them, and conceivably might have held that no excessive profits whatever had been realize. This would plainly have given appellant all the relief it needed, and have terminated its controversy with the Government.

The charges in the complaint that the Secretary's determination was arbitrary and that the renegotiation proceeding did not afford appellant due process (R. 8–9, 12–13) do not justify disregard of the available Tax Court remedy. The *de novo* determination which that body is directed to make would render wholly immaterial any de-

fects in the proceedings before the Secretary or in his determination under the Act. And "it is not to be assumed" that if appellant had applied to the Tax Court for a redetermination of the Secretary's order, it would have been denied "any right to which it is entitled." Cf. *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183, 188.

Appellant attempts to excuse its failure to apply to the Tax Court on the ground that that court would have no authority to pass upon questions as to the scope or application of the Act, or as to its validity (Br. 30–33). It is not necessary for purposes of considering the applicability of the exhaustion doctrine, to decide whether such issues could be determined by the Tax Court, and what effect its decision would have.[12] It is a sufficient answer to appellant's contention that resort to the statutory remedy could provide full relief.

Similar considerations underlie the settled rule

[12] It seems clear that the authority of the Tax Court to redetermine the "amount" of excessive profits would include jurisdiction over issues relating to the scope and application of the Act. A determination of the "amount" of excessive profits realized within the meaning of the Act, a power explicity vested in the Tax Court, must necessarily be preceded by either an assumption or a ruling as to the application of the Act to the contractor or contracts in question. Cf. *Dobson* v. *Commissioner,* 320 U. S. 489, 501; *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 509. As is pointed out in the petition for a writ of certiorari in *Land* v. *Waterman Steamship Corp.*, No. 435, this Term, approximately 65% of all renegotiation cases pending in the Tax Court raises issues of "coverage."

that a person aggrieved by an administrative order is not relieved of his obligation to exhaust all avenues of relief provided by statute, merely by charging that the underlying legislation is unconstitutional. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51; *St. Louis &c. R. Co.* v. *Public Comm'n*, 279 U. S. 560, 562–563; *Gorham Mfg. Co.* v. *State Tax Commission*, 266 U. S. 265. The reason for the rule is the reluctance of courts to "anticipate a question of constitutional law in advance of the necessity of deciding it," lest there be formulated "a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Cf. *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Commissioners*, 113 U. S. 33, 39. Had appellant gone to the Tax Court instead of applying to a court of equity for injunctive and declaratory relief, the Tax Court might have found that appellant realized no excessive profits at all, or might have fixed such profits at an amount which appellant would have been willing to refund. In either of such events, there would be no need for a decision as to constitutionality.[13]

[13] For this reason a three-judge court in the District of Columbia recently refused relief in a similar case, pointing out that if the Tax Court should hold that plaintiff received no excess profits, "the constitutionality of the Act is immaterial so far as the rights of the plaintiff are concerned." *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, No. 28999, decided September 28, 1945.

As this Court stated in *White* v. *Johnson*, 282 U. S. 367, 373:

> It would be subversive of all established principles were courts, in litigations between parties, who have reciprocal rights under the Constitution, to settle their controversies by broad statements to the effect that acts of Congress are unconstitutional upon their face; and this not only in ignorance of the circumstances and manner of the application of the statute by the administrative body, but with knowledge that the party complaining had failed to pursue the remedy provided by law.

See also concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346–348, and cases there cited.

For the same reasons, appellant has no standing to seek a declaration under the Federal Declaratory Judgment Act (Act of June 14, 1934, 48 Stat. 955, 28 U. S. C. 400), that the Renegotiation Act is unconstitutional. The Declaratory Judgment Act "does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin." *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97, 100 (C. C. A. 5), certiorari denied, 299 U. S. 559. Moreover, declaratory relief lies "only in the sound discretion of the

Court," and in *Alabama State Federation of Labor, Local Union No. 103* v. *McAdory*, No. 588, October Term, 1944, decided June 11, 1945, this Court held that it may not be invoked to test the constitutionality of a state statute in the absence of a "precise set of facts to which it is to be applied" and of "an authoritative construction" by a state court and "before it plainly appeared that the necessity for it had arisen." (Slip sheet opinion, pp. 8, 15.) Here, appellant's failure to apply to the Tax Court has precluded the formulation of a "precise set of facts" to which the Act "is to be applied," and "an authoritative construction" by that court of the Act's application to appellant. Since the Tax Court might have held that appellant had realized no excessive profits, the attempt to obtain a declaration as to constitutionality was made "before it plainly appeared that the necessity for it had arisen."

An exception to the foregoing principles is not justified by the fact that the statutory period of 90 days for petitioning the Tax Court has expired in this case. If the extraordinary processes of equity can be invoked by a litigant who has deliberately stood by while the time to apply for administrative review expired, an easy avenue is opened for wholesale disregard of a congressional scheme of review.[13a] The occasional instances of

[13a] It would also defeat the power that Congress vested in the Tax Court to determine as the amount of excessive profits an amount "greater than that determined by" the Secretary

individual hardship which might result from scrupulous observance of this sound rule of judicial administration are, we suggest, not sufficiently cogent to overcome the requirement of exhaustion of administrative remedy. And it is by no means clear that if denied relief here, appellant may not obtain it in the Court of Claims (see pp. 34-35, 38-42, *infra*).

C. THE PROVISION FOR FINALITY OF TAX COURT DECISION DOES NOT EXCUSE DISREGARD OF THAT REMEDY

Vesting in the Tax Court "exclusive jurisdiction * * * to finally determine the amount, if any, of such excess profits", Congress explicitly announced that "such determination shall not be reviewed or redetermined by any court or agency" (Sec. 403 (e), Appendix A, p. 37). Appellant relies upon that provision as justifying disregard of the Tax Court and resort to equity (Br. pp. 35–36). We submit that this contention is without merit.

We do not believe and make no contention that Congress entrusted to the Tax Court the authority to determine the constitutionality of the Act. But we do maintain that in leaving to that forum the exclusive and final decision of all questions re-

(Sec. 403 (e) (1); Appendix A, p. 37), for litigants, if they have a choice, would always choose a forum, such as a district court, which would be unable to treat them less favorably than did the Secretary.

lating to the amount of excessive profits under the Act, Congress neither exceeded its lawful powers, nor provided a remedy so defective that it might freely be ignored.

This court has sustained a statute which left very similar questions of excessive profits to the final decision of the Board of Tax Appeals, now the Tax Court. The Revenue Act of 1918 (40 Stat. 1057) provided for a special computation of excess profits taxes by the Commissioner of Internal Revenue upon a finding by him that the ordinary computation, owing to abnormal conditions, would work exceptional hardship on the taxpayer. Under the special computation, the tax was the amount bearing the same ratio to the net income of the taxpayer as "the average tax of representative corporations engaged in a like or similar trade or business" bore to the taxpayer's average net income for the year in question. This Court held that the Board of Tax Appeals had jurisdiction to review the Commissioner's action under this provision (*Blair* v. *Oesterlein*, 275 U. S. 220), but thereafter held that Congress did not intend taxpayers to have any court review of (1) the action of the Commissioner in denying a claim for special computation, or (2) his determination as to the rate of tax to be applied in the event of the allowance of a claim for special computation, *Heiner* v. *Diamond Alkali Co.*, 288 U. S.

502; *Williamsport Co.* v. *United States*, 277 U. S. 551. In the latter case it was held that the Court of Claims was without jurisdiction of a suit to recover excess profits taxes assessed and alleged to have been illegally collected under the Revenue Act of 1918, and that the determination of the Commissioner and the Board of Tax Appeals was final. Observing that the "considerations" which demanded special assessment under the Act were "facts concerning the situation of a large group of taxpayers which can only be known to an official or a body having wide experience in such matters and ready access to the means of information", Mr. Justice Brandeis said (277 U. S. at 561–562):

> Moreover, whatever jurisdiction is possessed by the Court of Claims to review determinations under §§ 327 and 328, would be possessed also by the district courts in suits against collectors and in actions against the United States, under § 24 (20) of the Judicial Code. Thus the determinations of the Commissioner in this delicate and complex phase of revenue administration would be subjected to review by a large number of courts, none of which have ready access to the information necessary to enable them to arrive at a proper conclusion in revising his decisions; whose experience in passing upon questions of this character would be limited; and whose varying de-

> cisions would tend to defeat, rather than promote, that equality in the application of the revenue law which §§ 327 and 328 were designed to insure. We conclude that the determination whether the taxpayer is entitled to the special assessment was confided by Congress to the Commissioner, and could not, under the Revenue Act of 1918, be challenged in the courts—at least in the absence of fraud or other irregularities.

These reasons apply with equal force to determinations made by the Tax Court in connection with renegotiations. Congress chose the Tax Court to perform that function because it "deals with very similar problems under the excess profits tax" and because "the use of one forum will bring about uniformity in the development and application of principles of decision" (89 Cong. Rec. 9929). Here, as under the Revenue Act of 1918, a proper determination in a "delicate and complex phase" of administration requires the exercise of expert judgment in the light of accounting practice, industry statistics, and profits allowed or voluntarily accepted under comparable circumstances. The typical renegotiation case requires that due consideration be given to such matters as costs, profits, losses, contingent liabilities, operating efficiency, price policies, war financing, taxes, plant conversion, peacetime earnings, depreciation, amortization, working capital and other concepts familiar to those who admin-

ister or adjudicate the Revenue laws."[14] Because Congress considered the Tax Court to be "peculiarly fitted to determine what is fair price and what is fair profit, having long been engaged in the determination of similar questions and being thoroughly equipped for this purpose," Congress gave it exclusive and final powers of decision. H. Rep. No. 871, 78th Cong., 1st Sess., p. 77.

It is impossible to contend that the Congressional decision was devoid of rational basis, or that Tax Court review of excessive profits under the Renegotiation Act is "incapable of affording * * * due process" to appellant. Cf. *Yakus* v. *United States*, 321 U. S. 414, 435. Congress has in fact been careful to guarantee war contractors as full and as fair a procedure as could be had in any judicial forum. Congress directed that the hearing in the Tax Court (Appendix A, pp. 37–39) is not to be "treated as a proceeding to review" the renegotiation order of the Secretary but "as a proceeding de novo," i. e., without prejudice to the contractor on account of prior determinations of excessive profits within the department. This proceeding would, moreover, be had in a forum

[14] See, e. g., Sec. 403 (c) (3) of the Act (Appendix A, p. 10) which requires that "In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code."

which in the words of this Court "has established a tradition of freedom from bias and pressures," whose "procedures assure fair hearings" and whose "deliberations are evidenced by careful opinions". *Dobson* v. *Commissioner*, 320 U. S. 489, 498. These safeguards of the contractor's rights render of little moment the technical classification of the Tax Court with quasi-judicial agencies in the executive branch rather than with a judicial tribunal like the Court of Claims (see App. Br. pp. 30–31). As this Court observed in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303,

> Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. See *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *United States* v. *George S. Bush & Co.*, 310 U. S. 371; *Work* v. *Rives*, 267 U. S. 175; *United States* v. *Babcock* [250 U. S. 328].[15]

In any event, the nonreviewability of Tax Court determinations would not excuse the invocation of its jurisdiction since the applicant might there receive all the relief it claims. In *First National Bank* v. *Weld County*, 264 U. S. 450, this Court

[15] See also *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; cf. *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 536; *Reetz* v. *Michigan*, 188 U. S. 505, 507.

held that a taxpayer's suit to recover taxes paid under protest was not maintainable in a district court where the plaintiff had failed to avail itself of an administrative remedy afforded by State law. Rejecting the contention that resort to that remedy was excused because "no appeal to a judicial tribunal was provided" from the administrative decision, this Court said that it could not "assume that if application had been made to the Commission proper relief would not have been accorded by that body" (264 U. S. at 454–455).

Nor does the Tax Court remedy, exclusive and final within its authorized scope, affect the contractor's right to a judicial decision as to the validity of the Act. As already shown (n. 4, *supra*), a final renegotiation determination as to excessive profits may be enforced only in one or more ways authorized by the Act: (1) reduction in contract price, (2) withholding amounts otherwise due, (3) directing another contractor to withhold amounts otherwise due, or (4) suit to recover. If the Government utilizes the first or second methods of enforcement, the contractor, after he has established the right to apply to a court by exhausting his administrative remedies (see pp. 14–27, *supra*), may sue the United States for the amounts otherwise due under the contracts, and when the United States asserts the renegotiation order as the justification for the reduction or withholding, the contractor may

obtain a judicial decision as to the validity of the Act. If the Government directs a prime contractor to withhold sums otherwise due to a subcontractor (the renegotiated company), the latter may obtain the same decision in a suit at law against the prime contractor because the defendant would be obliged to plead as a defense the renegotiation order and the Government's directions to withhold monies from the plaintiff;[16] and in such a suit, the United States would unquestionably be certified to intervene as a party pursuant to the Act of 1937 (28 U. S. C. 401). If the Government should bring an affirmative suit to recover under the renegotiation order, the defendant may plead unconstitutionality as a defense.

We have conceded (pp. 27–28, *supra*) that the provision in the Act making the Tax Court's determination final as to questions of amount does not apply to decisions as to the constitutionality of the Act. Furthermore, it does not apply to any other issues as to which a person aggrieved by a renegotiation order may constitutionally be entitled to a judicial hearing. This is so because, as is true of all other statutory language, the Tax Court provisions of the Act must be read with the Constitution, and any exceptions and qualifications required by the Constitution must be raised

[16] Cf. *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316, 322–323; *Coffman* v. *Federal Laboratories, Inc.*, 323 U. S. 325, 326–327.

within the statute if its language and the congressional intention do not forbid it. Here, Congress has expressly taken care of such a contingency by adding a separability clause to the Renegotiation Act (Sec. 403 (g); Appendix A, p. 39), which in effect announces that the Tax Court determination shall be final and unreviewable only to the extent that the Constitution permits it. *Crowell* v. *Benson*, 285 U. S. 22, 60–65; cf. *Reconstruction Finance Corporation* v. *Bankers Trust Co.*, 318 U. S. 163, 169–170. Consequently, the Tax Court provisions of the Act, read in this context, leave a person aggrieved by a renegotiation determination with access to such judicial relief as the Constitution requires. And, contrary to appellant's contention (App. Br., p. 34), its constitutional right of judicial review, whatever it may be, is not waived by proceeding in the Tax Court, but can be invoked in the appropriate court upon completion of the Tax Court proceeding. Cf. *St. Louis &c. R. Co.* v. *Public Comm'n*, 279 U. S. 560; *Lawrence* v. *St. L.-S. F. Ry.*, 274 U. S. 588; see also *Lockerty* v. *Phillips*, 319 U. S. 182, 188.[17].

[17] In urging that the Tax Court does not afford it an adequate avenue of relief from the Secretary's excess profits determination, appellant argues that the Renegotiation Act bars any "stay of the unilateral order (Section 403 (e))" and that "there is no certainty of a refund in the event of a favorable determination by the Tax Court" (App. Br., p. 36). But the provision for Tax Court redetermination obviously contemplates a refund of any amount by which the

It is therefore immaterial that the Renegotiation Act, like many other regulatory statutes, makes no provision for the decision of constitutional questions. Indeed, before the Tax Court remedy was afforded by the Revenue Act of 1943, Congress recognized that the forum available for appropriate judicial action would depend on the method chosen by the Government to enforce determinations of excessive profits.[18] Since there "is no constitutional requirement that [the] test" as to the vindication of constitutional rights "be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due

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excess profits determination is reduced by the Tax Court, and Congress has in fact provided for refunds of "any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to a unilateral determination of excessive profits." (See p. 42, n. 22, *infra*.) This removes all possibility of injury to an aggrieved contractor who applies to the Tax Court for a redetermination of his excess profits. Cf. *Stratton* v. *St. L. S. W. Ry.*, 284 U. S. 530; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481; *Arkansas Building Association* v. *Madden*, 175 U. S. 269. Even without such a provision, Congress would have a right to prohibit temporary injunctions against the enforcements of administrative orders, at least where an adequate remedy at law is available. Cf. *Lockerty* v. *Phillips*, 319 U. S. 182.

[18] In the 78th Cong., 1st Sess.: Hearings before H. Committee on Naval Affairs, pursuant to H. Res. 30, p. 507; see also Hearings before S. Committee on Finance on H. R. 3687, p. 990; Hearings before H. Committee on Ways and Means on H. R. 2324, 2698 and 3015, pp. 109 and 110; Hearings before the Subcommittee of the S. Committee on Appropriations on H. R. 2996, p. 137.

process" (*Yakus* v. *United States*, 321 U. S. 414, 444), the system of Tax Court redetermination plus judicial review in a further proceeding to the extent constitutionally required is entirely valid.

Appellant's reliance (App. Br., pp. 26, 36) on *Stark* v. *Wickard*, 321 U. S. 288, is misplaced. In that case this Court held that milk producers had standing to enjoin the Secretary of Agriculture from carrying out certain provisions of a milk order allegedly unauthorized under the Agricultural Marketing Agreement Act of 1937, which the producers claimed would have reduced the minimum prices to which they were entitled under the Act. The opinion makes it clear that the result was reached by way of construing the Congressional intention, and not because the Constitution required such judicial relief. Stating that "executive officers may be restrained from threatened wrongs in the ordinary courts *in the absence of some exclusive alternative remedy*" (p. 290), this Court held that although the Act did not specifically grant producers a right to judicial review of the Secretary's action, "the Congressional grant of jurisdiction [to hear the] proceeding appears plain" (p. 307); that "the silence of Congress as to judicial review is, at any rate *in the absence of an administrative remedy*, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts" (p. 309); and that the Act provided "no forum, other

than the ordinary courts to hear [the producers'] complaint" (p. 309) [all italics supplied].[19]

In the instant case, an "exclusive alternative remedy"—the Tax Court—is "the forum, other than the ordinary courts" provided by Congress to hear appellant's complaints, and a judicial body, the Court of Claims, affords appellant such review in addition to "administrative determinations" as the Constitution may require.

II

Appellant Has an Adequate Remedy at Law

The relief which appellant seeks in this suit is essentially the payment of approximately $1,000,000 due from the United States under contracts with appellant. Its sole grievance is that this money has been withheld in the Treasury at the direction of the Secretary to secure collection by the United States of the amount determined in his order of March 4, 1944, to be excessive profits under the Act. By stipulation between the parties, no action will be taken by the Government to enforce the Secretary's order of March 4, 1944, other than the withholding of an

[19] In view of what it deemed to be a "plain" grant of jurisdiction by Congress to the court of equity to hear the proceeding, this Court found it unnecessary to decide in that case "whether or not Congress could create such a definite personal statutory right in an individual against a fund handled by a federal agency * * * and yet limit its enforceability to administrative determination, despite the existence of federal courts of general jurisdiction" (p. 307).

equivalent amount otherwise due to appellant (R. 17, 45). Hence, appellant's position is simply that of a general creditor of the United States against whose claim for monies otherwise due it under contracts the Government seeks to set off an amount alleged to be due under the Renegotiation Act.[20] The prayer for an injunction against the Secretary's withholding or causing the withholding of such funds (R. 16) is an attempt to secure their payment. In the words of the court below, "Stripped of all legal verbiage, and reduced to its simplest terms" appellant seeks "to force the United States, through Forrestal in his official capacity—as its officer—to perform *its* promise to pay" (R. 59). Appellant has an obvious remedy at law to obtain such relief and at the same time to test the validity of the Act and the propriety of the set-off, insofar as it may be

[20] Appellant states that at "the time the complaint was filed [the Secretary] had threatened to not only withhold amounts otherwise due appellant from the United States, but as well, amounts due it from its numerous contractors," and argues therefrom that the jurisdiction of the court below is to be considered in the light of these facts alone (App. Br., p. 28). It is clear, of course, that appellant is bound by the stipulation between it and the Secretary (R. 17–18), under which the sole enforcement action of the Secretary is the direction to withhold an equivalent amount otherwise due appellant under Government contracts. In any event, the jurisdiction of a court of equity is not dependent solely upon the facts existing at the time the complaint is filed, but may take into consideration all facts properly before the court. *Crozier* v. *Krupp*, 224 U. S. 290; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113.

entitled to judicial adjudication of this issue. Appellant need merely bring suit against the United States in the Court of Claims for the amount due to it under its contracts. When the Government, in such a suit, asserts the right to set-off against that claim the amount alleged to be due under the Renegotiation Act on account of excessive profits as determined by the Secretary's order, appellant may obtain a decision, subject to review by this Court, of any questions which he is entitled to have judicially considered. And the Court of Claims, if it decided in favor of appellant, could grant a judgment for all the money withheld under the Renegotiation Act. The availability at law of a remedy which is at least as "plain, adequate, and complete" as the remedy in equity is fatal to injunctive relief in any federal court. Judicial Code §267, 28 U. S. C. 384; *Hurley* v. *Kinkaid*, 285 U. S. 95, 105; *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, 94; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497; *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 283. The issue raised in the complaint below as to the constitutionality of the Act does not affect these principles. "The fact that it would be convenient for the parties and the public to have promptly decided whether the legislation is valid, cannot justify a departure from * * * established principles of equity practice" (Brandeis, J., concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 345); see also *Arkansas*

Building Association v. *Madden*, 175 U. S. 269, 274.

Whatever may be the effect of appellant's failure to pursue the Tax Court remedy provided by the statute, and however it may limit the issues of which appellant is constitutionally entitled to a judicial determination, appellant's remedy in the Court of Claims is as adequate for the determination of those issues as a suit in the district court. Cf. *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316, 323.[21] The exclusiveness and finality of the Tax Court's jurisdiction are hence immaterial upon the question of equity jurisdiction.

Appellant attempts to support equity jurisdiction by arguing that the delay in ultimately refunding excessive profits erroneously collected by the Government would cause irreparable injury since the recovery would not include interest.

[21] Appellant in its brief (p. 27) cites, as supporting equity jurisdiction, the allegations in the complaint (R. 15) that the Secretary's "threat to cause appellant's customers to withhold payment on their contracts would seriously interfere with the business relations between appellant and its customers to its serious financial disadvantage," and that such withholding would oblige appellant "to bring a multiplicity of costly and vexatious suits against numerous of its customers scattered throughout the United States." These allegations are rendered irrelevant by the stipulation between the parties (R. 17–18) and the Secretary's affidavit (R. 41–46), showing that enforcement of the Secretary's order of March 4, 1944 is limited to the withholding, from amounts otherwise due to appellant from the United States, of $1,014,873.78, the full amount of the claim for excess profits. No other method of enforcement need or will be used.

(App. Br., p. 27.) This contention is rendered academic by a recent statute directing the award of interest by the Government on all refunds "erroneously collected by the United States pursuant to a unilateral determination of excessive profits." (Pub. L. No. 40, 79th Cong., 1st Sess., approved April 25, 1945).[22] Even without that statute, the inability to obtain interest against the United States in the Court of Claims on a contract claim does not render that remedy inadequate so as to support equitable jurisdiction; otherwise, specific performance could be had in every case to compel payment of a liquidated sum due under a Government contract—a principle for which no one could seriously argue. Moreover, since as a general rule "interest does not run upon claims against the Government" (*Smyth* v. *United States*; 302 U. S. 329, 353), appellant's remedy in equity would be no better than in the Court of Claims.[23]

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[22] That statute appropriated up to $15,000,000 for "Refunds under Renegotiation Act", "to remain available until June 30, 1946, * * * to refund any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to a unilateral determination of excessive profits, with such interest thereon (at a rate not to exceed 4 per centum per annum) as may be adjudged or determined to be owing in law or equity * * *."

[23] Tax cases cited by appellant, such as *Educational Films Corp.* v. *Ward*, 282 U. S. 379 (App. Br., p. 27), are not apposite. In that case, the aggrieved taxpayer attempted to enjoin collection of money lawfully in his possession; here the money which appellant seeks is in the lawful possession of the United States.

III

This Suit Is One Against the United States To Which Congress Has Not Consented

The instant suit is in form one against an individual—James V. Forrestal—and appellant strenuously maintains that he is to be treated here as a private individual and not as Secretary of the Navy acting in behalf of the United States (Br. pp. 19–21). So to treat him would be unrealistic and inaccurate in the extreme. Nothing Forrestal has done or may do as a private citizen is complained of here; all his acts have been or will be done only in his official position as Secretary or Under Secretary of the Navy. The renegotiation order of March 4, 1944, was issued by him as Under Secretary of the Navy pursuant to an Act of Congress (R. 5–6) and his directions to the Treasurer of the United States to withhold from appellant monies in the Treasury which would otherwise be due from the United States were obeyed because Forrestal was acting as a Federal official with statutory authority to hold up payments out of the United States Treasury.

But it is in any event immaterial that the nominal defendant is Forrestal. The sovereign immunity extends to suits "against its officers, agents, and representatives, where the [Sovereign], though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judg-

ment or decree effectively operates." *In re Ayers*, 123 U. S. 443, 506; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387. If the officers who are sued in their individual or personal capacity have no individual or personal interest in the controversy, and if the suit seeks to control their actions and exercise of functions as officers of the United States, the immunity from suit is applicable.[24] Measured by these criteria, the suit below was properly dismissed as one against the United States, for at least three reasons:

1. The sum of about $1,000,000 which the Secretary of the Navy, pursuant to statutory direction, has ordered the Treasurer of the United States to withhold "from amounts otherwise due to the contractor" is in the Treasury of the United States. The only prayer for relief here relevant, in view of the stipulation and the Secretary's affidavit (R. 17–18, 45), is appellant's request (R. 16) that the Secretary be enjoined from "Withholding or instructing or requesting the United States * * * to withhold any monies due, or to become due" to appellant "*from the United States* or any agency or instrumentality thereof."[25] (Emphasis added.) This in effect seeks to com-

[24] *Belknap* v. *Schild*, 161 U. S. 10, 25; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Hagood* v. *Southern*, 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457.

[25] Appellant's prayers below for an injunction to restrain Forrestal from instructing other contractors to withhold any monies due to appellant, from further proceedings to rene-

pel payment out of the Treasury of a claim against the United States, arising out of contracts between appellant and the United States. Since only the withholding order precludes the Treasury from paying appellant the sums otherwise due to appellant under its Government contracts, an injunction against withholding is equivalent to a direction to pay money out of the Treasury.[26] As this Court has recently stated, "when the action is in essence one for the recovery of money" from the sovereign, it is the "real, substantial party in interest and is entitled to invoke its sovereign im-

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gotiate appellant's contracts, and from other proceedings to enforce the March 4, 1944 order (R. 16) need not be considered further since the stipulation and the Secretary's affidavit (R. 17–18, 41–46) have eliminated all of the acts described from this case.

[26] Appellant argues that it "is not asking any relief which will require this Court to produce one cent for it," and that this "Court is not being asked to require Congress to appropriate funds because the record shows vouchers payable to appellant from funds already appropriated, have been issued and are in the hands of appellee as security" (App. Br., p. 19, see also p. 15). The Secretary's affidavit adequately rebuts this hypertechnical quibble. As pointed out therein, the sum of approximately $1,000,000 "as to which payment has been suspended, is being held" by the Treasury of the United States "as an obligated but unexpended balance in the particular appropriation accounts of the Navy Department applicable to the various contracts with the plaintiff" (R. 46). Since, as appellant points out, vouchers for such amount have already been issued, and issuance of the checks to appellant under such vouchers has been prevented only by the Secretary's withholding order, the lifting of the withholding order would be followed in due course by payment to appellant from the Treasury of the United States of the sums withheld.

munity from suit even though individual officials are nominal defendants." See *Ford Co.* v. *Department of Treasury*, 323 U. S. 459, 464; see also *Smith* v. *Reeves*, 178 U. S. 436; *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47; *Lankford* v. *Platte Iron Works*, 235 U. S. 461.[27]

2. The direct and immediate effect of granting the relief sought by appellant will be to compel the United States to perform its promise to pay appellant some $1,000,000 pursuant to contracts with the United States. This effect is neither collateral nor accidental, for the Secretary's action complained of, and sought to be enjoined here, is his interference with such payments, otherwise due. An injunction would affect a contract of the United States, not any obligations or rights of the Secretary of the Navy. Hence this suit is in effect one for specific enforcement of a contract with the United States, and barred by its immunity.[28] Appellant is seeking "an affirmative

[27] Certain of the cases cited in this section of the brief involve the immunity of states from suit. In determining whether a proceeding must be dismissed because it is a suit against the United States, the same rules apply as in determining whether a suit must be dismissed because of the sovereign immunity of a State. *Kansas* v. *United States*, 204 U. S. 331, 341; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Hopkins* v. *Clemson College*, 221 U. S. 636, 645.

[28] *Wells* v. *Roper*, 246 U. S. 335; *Louisiana* v. *Jumel*, 107 U. S. 711; *Goldberg* v. *Daniels*, 231 U. S. 218; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. 2d 288 (C. C. A. 2), certiorari denied, 293 U. S. 603; *United States ex rel. Shoshone Irr. Dist.* v. *Ickes*, 70 F. 2d 771 (App. D. C.), certiorari denied, 293 U. S. 571.

remedy * * * against the Government which, though in form merely restrictive of an officer, was really mandatory against the sovereign" (cf. *Goltra* v. *Weeks*, 271 U. S. 536, 546).[29]

The sovereign's immunity from this type of a suit cannot be overcome by allegations that the officer's action or threatened action was without authority in the Constitution or the statute.[30]

3. Appellant may institute suit directly against the sovereign in the Tax Court and in the Court of Claims instead of "behind its back" in an equity suit against its officer, cf. *Goldberg* v. *Daniels*, 231 U. S. 218, 222. The sovereign having consented to be sued in these designated forums, the situation is peculiarly one for the application of the "principle of immunity from litigation

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[29] *Ickes* v. *Fox*, 300 U. S. 82, heavily relied upon by appellant (Br. p. 19), is distinguishable, since the water rights there held protectible by an injunction against an order of the Secretary of the Interior had become "vested," and the suit did "not seek specific performance of any contract" but merely to enjoin the Secretary "from enforcing an order, the wrongful effect of which will be to deprive [plaintiffs] of vested property rights" (at p. 96).

[30] *Morrison* v. *Work*, 266 U. S. 481; *Lankford* v. *Platte Iron Works*, 235 U. S. 461; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Goldberg* v. *Daniels*, 231 U. S. 218; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Louisiana* v. *Jumel*, 107 U. S. 711; *Boeing Air Transport, Inc.* v. *Farley*, 75 F. 2d 765 (App. D. C.), certiorari denied *sub nom. Pacific Air Transport* v. *Farley*, 294 U. S. 728; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. 2d 288 (C. C. A. 2), certiorari denied, 293 U. S. 603.

[which] assures the states and the nation from unanticipated intervention in the processes of government * * *. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interference require a restriction of suability to the terms of the consent, as to persons, courts and procedures.'" *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47, 53–54; see also *Ford Co.* v. *Department of Treasury*, 323 U. S. 459.

It is enough to sustain the judgment below that Congress did not consent to have the United States sued in the type of case here involved.[31]

[31] In *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, which appellant urges controls the case at bar (App. Br. pp. 14–16), this Court upheld an injunction against the collection of taxes under the Agricultural Adjustment Act, one week after that Act had already been declared invalid in *United States* v. *Butler*, 297 U. S. 1. Nothing in the opinion implies that the Court would have sustained the suit as a means of testing the validity of the Agricultural Adjustment Act. Furthermore, in the *Rickert* case, the taxpayer was attempting to enjoin the collection of monies lawfully in his possession, demanded under an invalid act; here, the monies which appellant seeks are in the lawful possession of the United States, withheld under an Act of Congress which has not been declared invalid.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 71.—October Term, 1945.

Mine Safety Appliances Company, Appellant, *vs.* James V. Forrestal.	On Appeal from the District Court of the United States for the District of Columbia.

[December 10, 1945.]

Mr. Justice Black delivered the opinion of the Court.

After an investigation in which appellant appeared, appellee James V. Forrestal, while Under Secretary of the Navy, determined that the appellant had received a large amount of excessive profits on government war contracts within the meaning of the Renegotiation Act.[1] Pursuant to the powers given him by that Act the appellee notified appellant that unless appellant took action to eliminate these profits the Under Secretary would direct government disbursing officers to withhold payments due appellant on other contracts sufficient in amount to offset the government's loss due to the excessive profits.[2] Section 403(e) of the Renegotiation Act provides that any contractor aggrieved by the Secretary's determination may within ninety days apply to the Tax Court for a de novo trial and adjudication of the issue. The section provides that the Tax Court "shall have exclusive jurisdiction . . . to finally determine the amount . . . and such determination shall not be reviewed or redetermined by any court or agency." 58 Stat. 86. The appellant without following the procedure provided for in Section 403(e) filed this complaint in the District Court. The complaint seeks an injunction and declaratory judgment. It alleges among other things that the Act is unconstitutional on many grounds; that withholding payment of the sums found to represent excessive profits would seriously interfere with appellant's

[1] 56 Stat. 226, 245; 56 Stat. 798, 982; 57 Stat. 347; 57 Stat. 564; 58 Stat. 21, 78.

[2] Section 403(c)(2) of the Renegotiation Act authorizes and directs the Secretary to eliminate excessive profits by, among other things, "withholding from amounts otherwise due to the contractor any amount of such excessive profits."

operations and with production of critical materials for the government; that due to statutes and executive orders which make many of the appellant's contracts confidential and secret, it will be impossible for it to carry on proceedings to enforce its contract rights until these restrictions are lifted; and that it is without a plain, adequate and complete remedy at law.[3] The District Court composed of three judges dismissed the complaint as a suit against the United States to which the sovereign had not consented, 59 F. Supp. 733, and the case comes before us on direct appeal. 28 U. S. C. § 380a. Here government counsel, appearing for the Secretary, advance the District Court's grounds and contend further that the judgment below be affirmed because appellant failed to exhaust its administrative remedy and to follow the statutory procedure in not first going before the Tax Court to which Congress has granted "exclusive" jurisdiction and because it does not appear that appellant is without an adequate legal remedy.

We think the government is an indispensable party in this case, and since it has not consented to be sued in the District Court in this type of proceeding, the complaint was properly dismissed against the government officer. *Minnesota* v. *United States*, 305 U. S. 382; *Stanley* v. *Schwalby*, 162 U. S. 255. Appellant contends that the action seeks to prevent a tort by the Secretary, acting as an individual and not as an officer of the government, consisting of a trespass against appellant's property, and that equitable relief is necessary because appellant has no adequate remedy at law and since it would otherwise suffer irreparable loss. Under our former decisions, had the factual allegations supported these contentions, the complaint as filed would, in the absence of any further proceedings, have provided a basis for the equitable relief sought. See e. g., *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 619-620. For according to these cases, if we assume, as we must for the purpose of disposing of the jurisdictional issue, that appellant's allegations including the one that the Renegotiation Act is unconstitutional are true, the

[3] Appellant also alleged below that the Secretary had threatened to instruct other contractors to withhold any moneys due to appellant. A stipulation and affidavit by the parties reveal, however, that this action will in fact not be taken. Any controversy that might have been before the court by virtue of this allegation has, thus, become moot. It can therefore not serve as the basis for the court's consideration of the constitutional and other questions here in issue. United States v. Alaska Steamship Co., 253 U. S. 113; Commercial Cable Co. v. Burleson, 250 U. S. 360; Montgomery Ward & Co. v. United States, — U. S. —. Cf. Hoffman v. Breeze Corporations, 323 U. S. 316.

fact that the Secretary had acted pursuant to the command of that statute would have made no difference. These cases hold that a public officer can not justify a trespass against a person's property by invoking the command of an unconstitutional statute. Under such circumstances, the tort becomes the officer's individual responsibility, and the government is not held to have sufficient interest in the controversy to be considered an indispensable party. But the government does not lack such interest in all cases where the suit is nominally against the officer as an individual. The government's interest must be determined in each case "by the essential nature and effect of the proceeding, as it appears from the entire record." *Ex parte in the Matter of the State of New York*, 256 U. S. 490, 500.

Here, the essential allegations and the relief sought do not make out a threatened trespass against any property in the possession of or belonging to the appellant. Nor does the record present any other circumstances that would make the Secretary suable as an individual in this proceeding. Certainly the action which the Secretary proposed to take is not a violation of any express command of Congress. Cf. *Ralston* v. *Missouri Fund Com'rs.*, 120 U. S. 390, 411; *Houston* v. *Ormes*, 252 U. S. 469; *Smith* v. *Jackson*, 246 U. S. 388. The sole purpose of this proceeding is to prevent the Secretary from taking certain action which would stop payment by the government of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant. The assumption underlying this action is that if the relief prayed for is granted, the government will pay and thus relinquish ownership and possession of the money. In effect, therefore, this is an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented. The underlying basis for the relief asked is the alleged unconstitutionality of the Renegotiation Act[4] and the sole purpose of the proceeding is to fix the government's and not the Secretary's liability. Thus, though appellant denies it, the conclusion is inescapable that the suit is essentially one designed to reach money which the government owns. Under these circumstances the government is an indispensable party. *Minnesota* v. *United States*, 305 U. S. 382, 388, even though the Renegotiation

[4] This is seen from the prayer for a declaratory judgment, which asks only that the Renegotiation Act be held unconstitutional.

Act under which the Secretary proposed to act might be held unconstitutional. *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52, 67, 68; *In re Ayers*, 123 U. S. 443, 496, 497, 505-507; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9; *Wells* v. *Roper*, 246 U. S. 335, 337; see also *N. Y. Guarantee and Indemnity Co.* v. *Steel*, 134 U. S. 230. In short the government's liability can not be tried "behind its back." *Louisiana* v. *Garfield*, 211 U. S. 70, 78.

Affirmed.

Mr. Justice REED concurs in the result for the reason that he thinks no adequate ground is alleged for an injunction. In his view a legal remedy exists in the Court of Claims and the stipulation, referred to in the opinion, removes multiplicity of actions for relief as a possible ground.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

since objection to the amount of excess profits is waived